

46 Am. Jur. 2d Judges § 239

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Judges

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XII. Special, Substitute, or Pro Tem Judges

B. Selection of Judge

§ 239. Selection of substitute judge by parties and members of the bar

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Judges](#)  [15\(1\)](#), [15\(2\)](#), [16\(.5\)](#), [16\(1\)](#)

Forms

Forms relating to pro tem, substitute, or special judges, generally, see Am. Jur. Pleading and Practice Forms, Judges [\[Westlaw®\(r\) Search Query\]](#)

The source of a judge pro tempore's authority is not the electorate but the consent of the parties,¹ and absent a valid stipulation by the litigants, a temporary judge has no jurisdiction to act.² The parties' consent must be given in writing or orally in open court³ or may be implied from the parties' conduct.⁴

A subordinate officer, such as a court commissioner, may act as temporary judge only where the parties so stipulate,⁵ and such stipulation may impliedly arise from the parties' common intent.⁶ Some constitutions provide that only retired judges can be appointed pro tempore without the parties' consent.⁷

Some statutes or constitutions provide that, with the parties' consent, a member of the bar may take the place of a disqualified judge;⁸ and some jurisdictions provide that, under certain circumstances, the bar may elect one of their number as special judge to try a particular case or to hold a term of court.⁹

Substitution of a judge during a criminal trial does not require the defendant's consent,¹⁰ although some authority holds that, pursuant to statute, the consent of both parties is necessary.¹¹

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Footnotes

- 1 Zachman v. Whirlpool Financial Corp., 123 Wash. 2d 667, 869 P.2d 1078 (1994).
- 2 Del Real v. City of Riverside, 95 Cal. App. 4th 761, 115 Cal. Rptr. 2d 705 (4th Dist. 2002).
- 3 Mitchell v. Kitsap County, 59 Wash. App. 177, 797 P.2d 516 (Div. 2 1990).
- 4 In re Estate of Fain, 75 Cal. App. 4th 973, 89 Cal. Rptr. 2d 618 (2d Dist. 1999).
As to waiver of objection to the authority of a substitute judge, see § 251.
- 5 Rooney v. Vermont Investment Corp., 10 Cal. 3d 351, 110 Cal. Rptr. 353, 515 P.2d 297 (1973).
- 6 In re Horton, 54 Cal. 3d 82, 284 Cal. Rptr. 305, 813 P.2d 1335 (1991).
- 7 Zachman v. Whirlpool Financial Corp., 123 Wash. 2d 667, 869 P.2d 1078 (1994).
As to retired judges, see § 236.
- 8 State ex rel. Burdge v. Cummings, 208 Ind. 292, 195 N.E. 879, 104 A.L.R. 1492 (1935); National Box Co. v. Bradley, 171 Miss. 15, 154 So. 724 (1934); Moruzzi v. Federal Life & Casualty Co., 1938-NMSC-002, 42 N.M. 35, 75 P.2d 320, 115 A.L.R. 407 (1938).
- 9 Chandler v. Chandler, 92 Kan. 355, 140 P. 858 (1914); Ridout v. State, 161 Tenn. 248, 30 S.W.2d 255, 71 A.L.R. 830 (1930); Brinkley v. Brinkley, 147 W. Va. 557, 129 S.E.2d 436 (1963).
- 10 People v. Moreda, 118 Cal. App. 4th 507, 13 Cal. Rptr. 3d 154 (1st Dist. 2004).
- 11 People v. Hicks, 447 Mich. 819, 528 N.W.2d 136 (1994).

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